TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 576.

EDWARD B. WHITNEY, AS TRUSTEE IN BANKRUPTCY OF DANIEL LE ROY DRESSER AND CHARLES E. RIESS, AS MEMBERS OF THE FIRM OF DRESSER & CO., APPELLANT,

vs.

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE G. BOLDT, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 28, 1905.

(19,675.)

(19,676.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 22, 1905.

1 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, as Members of the Firm of Dresser & Company, Complainant-Appellant,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants-Appellees.

Statement.

1904.
Nov. 7. Filed complaint.
Dec. 2. Filed appearance U. S. Mortgage & Trust Co. by Messrs. Rollins & Rollins.
" 5. Filed appearance Security Warehousing Company by Messrs. Smith & Barker.
" 6. Filed appearance of L. F. Doyle, Esq., for Wenman, Fish & Boldt.

1905.
Jan. 3. Filed demurrer C. H. Wenman.
" " Filed demurrer Stuyvesant Fish.
" " Filed demurrer Geo. C. Boldt.
" " Filed demurrer Security Warehousing Co.
" 24. Filed notice of argument of demurrer.
Feb. 7. Demurrer sustained, memo., Holt, J.
" 21. Filed order sustaining demurrers.
M'ch 2. Filed certificate.
" " Filed petition and allowance of appeal.
" 2. Filed assignment of errors.
" 9. Filed citation.

2 The District Court of the United States in and for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, as Members of the Firm of Dresser & Co.,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company.
} In Equity. No. —.

To the judges of the district court of the United States in and for the southern district of New York:

Edward B. Whitney, as trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, as members of the firm of Dresser &

Co., bankrupts, brings this his bill against Charles H. Wenman Stuyvesant Fish, George C. Boldt, the Security Warehousing Company and the United States Mortgage and Trust Company (paragraphs numbered 2 to 4 and 6 to 30, all inclusive, being stated on information and belief); and thereupon your orator complains and says that:

1. On or about the 17th day of September, 1903, your orator was duly appointed trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, individually and as members of the firm of Dresser & Co., in a proceeding then and now pending in the district court of the United States for the southern district of New York,
3 entitled "In the matter of Daniel Le Roy Dresser and Charles E. Riess, individually and as members of the firm of Dresser & Co., bankrupts, No. 5728." On September 29, 1903, your orator duly qualified as such trustee, and ever since has been and now is acting as trustee in bankruptcy of the said Dresser and the said Riess individually and as members of the said firm of Dresser & Co. aforesaid. At the time hereinafter mentioned, and up to March 7th, 1903, the said Dresser and Riess were carrying on business as merchants under the firm name of Dresser & Co., at Nos. 15 and 17 Greene street, in the borough of Manhattan, city of New York.

2. The defendant, The Security Warehousing Company, at the times hereinafter mentioned, was and is a corporation, organized and existing under and by virtue of the laws of the State of New York.

3. The defendant, The United States Mortgage and Trust Company, at the times hereinafter mentioned, was and is a corporation organized and existing under and by virtue of the laws of the State of New York.

4. In and about some or all of the matters and things in this complaint referred to and set forth as done by him, the defendant, Charles H. Wenman acted as the agent and attorney in fact of the defendants, Stuyvesant Fish and George C. Boldt, and Fish and Boldt were the principals of said Wenman with respect to some or all of his dealings with the firm of Dresser & Co. and the members thereof, and with respect to some or all of the dealings of Wenman with any and all of the defendants in this suit, as in this bill set forth, and some or all of the moneys paid to him were or should have been paid over, less whatever may have been his agreed
4 compensation as such agent and attorney, to his said principals.

5. Prior to March 7, 1903, the bankrupts, Daniel Le Roy Dresser and Charles E. Riess, individually and as members of the firm of Dresser & Co., became insolvent, and on that day they assigned all of their property individually and as members of the said firm to Charles S. Mackenzie, as assignee, for the benefit of their creditors, and on March 9, 1903, upon the petition of certain creditors of the bankrupts, Robert C. Morris and Charles S. Mackenzie were duly appointed by the district court of the United States for the

southern district of New York, receivers in bankruptcy of the firm of Dresser & Co. and of the said Dresser and Riess individually.

6. For at least six months prior to the 7th day of March, 1903, the firm of Dresser & Co., and its members had been insolvent, and unable to pay their debts, and were only able to continue in business by borrowing large sums of money to secure which, without injury to their credit, it became necessary to pledge the goods, wares and merchandise in which they were dealing, but at the same time, to conceal from their unsecured creditors the fact that the same were pledged. The goods, wares and merchandise, so dealt in by the firm of Dresser & Co., consisted for the most part of Japanese silk, imported by it for sale.

7. For the purpose of pledging these goods with certain of their creditors, without the knowledge of their other creditors, Dresser & Co. entered into the following plan and arrangement with the defendant, The Security Warehousing Company:

5 A certain alleged lease of their store, display and sales room at 15–17 Greene street in the city of New York, was made by Dresser & Co. to the Security Warehousing Co., at a nominal rental of one dollar per year, in order that thereafter the Security Warehousing Co. might claim and pretend that the store and the display and sale room belonged to it, that it was one of its warehouses, and that all of the goods therein, belonging to the firm of Dresser & Co., had been delivered to it for storage in its said pretended warehouse.

8. There was no change of location or custody of the said goods, but Dresser & Co. remained in possession and control thereof, and sold and disposed of them in the same manner and in the same way as that firm had previously done prior to the pretended storing, exhibiting the same to their customers, sending such portions as it desired to the dyers and manipulators, and generally handling and using the said goods as if they were unpledged, and free and clear of all liens or other incumbrances.

9. The Security Warehousing Company exercised no supervision or control over said goods, but it nominally employed or pretended to employ one Gertrude B. Fish, the confidential clerk and secretary of Daniel Le Roy Dresser and Dresser & Co., as its alleged custodian, in whose charge it was claimed the goods had been placed, paying her, or contracting to pay her, a so-called salary of one dollar a month. She exercised no control or supervision over said goods, and during the entire period, while it is claimed she was so employed, she continued to act as the confidential clerk and secretary of Dresser & Co. and of Daniel Le Roy Dresser. The Security

6 Warehousing Company also placed a few small tags on certain of the shelves, bins and counters, on which the silk goods were stored, and displayed for sale, upon which tags the name of the Security Warehousing Co. was printed, but the tags were not easily discernible, and in almost all instances were so turned and placed as not to be readily seen, and were not so affixed as to identify the

goods which it was claimed and pretended were represented by the several security instruments held by the defendants and hereinafter referred to.

10. After Dresser & Co. had thus pretended to store the said goods with the Security Warehousing Company by means of the foregoing secret arrangements, the Security Warehousing Company prepared certain instruments in writing (which for the sake of brevity are herein referred to as security instruments) in the general form of warehouse receipts, purporting on their face to be warehouse receipts, and representing that certain goods had been stored with it at its warehouse, Nos. 15–17 Greene street, in the city of New York (which was in fact the store of Dresser & Co.)

11. The security instruments did not describe the goods, purported to be covered thereby, in such a way as to render them capable of identification, but merely stated that goods of a certain quality, value and amount had been stored, and it was impossible by an inspection of any one of the security instruments or in any other way to determine what goods were represented by it.

12. These security instruments were delivered to Dresser & Co., and some were delivered in turn to the Security Warehousing Co., some to the United States Mortgage and Trust Company, and
7 some to the defendant Wenman for himself or for the defendant- Fish and Boldt, and some to other parties, with the intent or pretense to secure certain loans then claimed to be made, or which they claimed had been made to Dresser & Co.

13. All of the security instruments outstanding on the 9th of March, 1903, were held by the defendants herein.

14. Daniel Le Roy Dresser was one of the incorporators of the defendant, The Security Warehousing Company, and from the time of its organization, and until after the 7th day of March, 1903, he was one of its directors and stockholders, and he was influential in the management and conduct of its business.

15. At the times of the delivery of the security instruments, Charles S. Mackenzie, had been for some time, and during all the times mentioned in this bill, he continued to be the general counsel of the defendant, The Security Warehousing Company, and was fully cognizant of the details of its business and of its system of pretended storage hereinbefore described, and he was also the personal counsel and confidential representative of Daniel Le Roy Dresser.

16. After the delivery of the security instruments to the defendants, Dresser & Co. continued to display for sale and to sell and dispose of the goods so pretended to be stored as aforesaid, and to send the same to be dyed and otherwise manipulated, in the same manner and in the same way as they had been in the habit of doing prior to the said pretended storing, to all of which neither the Security Warehousing Company nor any of the defendants made any objections; nor did they make any effort to prevent the sale and dis-

position of the goods, and the management and control thereof by Dresser & Co.

8 17. At the times of the delivery of the security instruments to the defendants, they all knew, or ought to have known, that the store, sale and display room at Nos. 15–17 Greene street was not the warehouse of the Security Warehousing Company, but that it was the store and display room of Dresser & Co., and that the goods therein located were not in the custody of the Security Warehousing Company, but were in the custody and control of the firm of Dresser & Co.; they all knew or ought to have known that the goods were being sold, disposed of and otherwise managed by Dresser & Co. as in the preceding paragraph described.

18. When the receivers, Morris and Mackenzie, went into possession of the store, the display and the sales room of Dresser & Co. on the 9th day of March, 1903, upwards of $150,000. worth of the goods belonging to that firm were still there, and in the possession and under the control of Dresser & Co. After the receivers had taken possession of the store, the defendant, The Security Warehousing Company, notified them that it claimed that the store, sales and display room belonged to it, under the alleged lease, and that the goods therein contained had been stored with it by the firm of Dresser & Co., and it demanded the delivery of all of the goods.

19. The receivers did not dispute this claim of the Security Warehousing Co., but acquiesced therein and complied therewith.

20. Neither the court nor the unsecured creditors of Dresser & Co. were advised of the facts concerning this claim, nor the character of the pretended storing upon which the so-called warehouse receipts were based.

9 21. Thereafter the Security Warehousing Company, and the receivers, the said Morris and Mackenzie, entered into certain agreements under which some of the goods were sold by the latter, as the agents of that company, and the proceeds thereof paid over by them to it, without notice to the other creditors of the firm of Dresser & Co., and without any memoranda, account or statement of what moneys were received from the sale of the goods claimed to be represented by any one of the security instruments. The balance of the said goods were sold by the Security Warehousing Co. through other agents, and without notice to the other creditors of Dresser & Co.

22. In addition to the goods, in the possession of the firm of Dresser & Co. at the time of its failure, the Security Warehousing Company claimed to Morris and Mackenzie that certain of the goods, so claimed to have been stored with it, and represented by said security instruments, had been sold by the firm of Dresser & Co. prior to the 7th day of March, 1903. The amount of said goods, so claimed to have been sold, is unknown to your orator, but he has been informed by Morris and Mackenzie, and he therefore charges it to be true, that it exceeded in value the sum of $22,000., and that thereafter and subsequent to the 9th day of March, 1903, they collected

certain accounts receivable of the firm of Dresser & Co., of upwards of $20,000., and paid over the same to the defendant The Security Warehousing Company, without notice to the other creditors of Dresser & Co.

23. All of these silk goods were sold and all of these accounts receivable were collected by the Security Warehousing Company prior to the appointment of your orator as trustee in bankruptcy of Dresser & Co.; and none of the goods or their proceeds or of the accounts receivable have come into his possession, except the sum of one thousand nine hundred and forty-four 93/100 dollars ($1,944.93) paid to your orator by the Security Warehousing Co.

24. A large part of the proceeds of the goods sold and paid over to it and of the accounts receivable collected and paid over to it by Morris and Mackenzie, and of the goods sold by it through other agents, were in turn paid over by the Security Warehousing Co. to the other defendants herein, as the holders of said security instruments, and the balance of said proceeds were either retained by the Security Warehousing Co. or improperly disbursed by it.

25. The security instruments, under which part of the goods were sold and the accounts receivable were collected by Morris and Mackenzie, and their respective proceeds paid over by them to the Security Warehousing Co. and under which the balance of the goods were sold by it through other agents and by it retained or paid out as aforesaid, were and are invalid and of no force and effect, as against your orator, for the reason that they, and the pretended storing of the goods with the Security Warehousing Co. upon which they are based, constitute an attempt to create a lien thereon, in favor of the holders thereof, contrary to the law and statutes of the State of New York.

26. The goods and the proceeds thereof, together with the accounts receivable collected and paid over by the receivers, constituted a portion of the estate of Dresser & Co. and are a trust fund of which the plaintiff as trustee in bankruptcy is and was trustee for
11 the benefit of the credi- of the firm of Dresser & Co., which fund has been diverted by the Security Warehousing Company to its own use, and to the use of the other defendants herein.

27. The books and records of the Security Warehousing Company containing all of the entries and information concerning the sale and the disposition of said goods, and the proceeds thereof, and of the said accounts receivable, have all been lost or destroyed, through the negligence or other wrongful act of the defendant, The Security Warehousing Company, and no copies thereof are in existence, nor are there any books, records, memoranda, or other sources from or by means of which your orator can ascertain the facts concerning said sale and disposition.

28. Because the security instruments delivered to the various defendants herein by Dresser & Co. and the pledging of the goods, claimed to be represented thereby, are valid as between the defend-

ants holding the said instruments and the firm of Dresser & Co., it is only by recourse to your honors that your orator, as trustee for the creditors of the firm, can have the same declared void, as being an attempt to create a lien upon said goods, contrary to the law and statutes of the State of New York.

29. All of the goods were commingled and sold without regard to the security instruments, purporting to cover them, and the proceeds were distributed by the Security Warehousing Company without regard to the particular goods from the sale of which they came, so that if any or all of the security instruments should for any reason be held to be valid as against your orator, it is impossible (by reason of this commingling, and of the facts in paragraph 27 set
12 forth and of the failure to properly describe the goods in the security instruments themselves) to ascertain whether the defendant holders thereof received the proceeds of the goods covered thereby and whether or not there was a surplus over and above the loans claimed to be secured by the same respectively, or whether or not the said defendant holders or any of them are accountable to your orator for such surplus, so that only from your honors can your orator receive proper and adequate relief with respect to said security instruments, the transactions represented thereby, and the rights of the various parties therein and thereto.

30. The silk goods were, for the most part, sold at prices below their actual value and for much less than they could have been disposed of at a properly advertised public sale. The price for which each particular lot of said goods was sold is unknown to your orator, but the net amount realized therefrom was less than $125,000, while the aggregate value of said goods as stated in said security instruments amounted to more than $150,000. The values placed upon the said goods in said security instruments represented the cost price thereof to the firm of Dresser & Co., which cost price averaged from 20 % to 40 % less than the market value thereof at which the firm of Dresser & Co. had been accustomed and were able to sell them in the city of New York and elsewhere.

31. With respect to the said goods and the proceeds thereof, and the said accoubts receivable constituting the said trust fund so diverted by the Security Warehousing Company as aforesaid, your orator is the trustee of an express trust for the benefit of the
13 creditors of the firm of Dresser & Co., and as such is entitled to protection from your honors, and to seek relief therefrom against the defendants, who have all participated in the diversion of his trust estate by means of the aforementioned secret and illegal transactions; and your orator, as such trustee as aforesaid, is further entitled, in case any of said transactions be decreed to be valid, to relief in equity against the said defendants, by reason of the improper and improvident sale and distribution of the portion of the said fund included in said transactions, so decreed to be valid, and

to the determination by your honors of his rights with respect thereto.

Your orator prays that the security instruments, in the foregoing bill described, be decreed invalid, fraudulent, and void with respect to your orator, and that he be decreed the owner of the goods and accounts receivable purporting to be covered thereby, and that the defendants be decreed to pay over to your orator any and all of the goods or the proceeds thereof, and the proceeds of the said accounts receivable, purporting to be covered by the said security instruments which shall appear to have been taken or received by them respectively or by their agents or representatives, and that it be decreed, in case the specific goods and accounts receivable can not be delivered to your orator by the defendants, that your orator recover from the defendants the market value of the goods taken by them respectively at the time of the taking, together with the proceeds of the accounts receivable so taken by them, together with interest thereon; and that in case any of the security instruments
are decreed valid and effective as against your orator, and
14 that the defendants or any of them were entitled to hold and
sell the goods and to collect the accounts receivable covered thereby, then and in that event that it be decreed that the said defendants and each of them make full disclosure and discovery to your orator of all the acts and things done by each and all of them, with respect to said goods and their sale, and the accounts receivable, and of the disposition of the proceeds thereof; and that the defendants pay over to your orator, in addition to the said sum of $1,944.93 already paid to him by the Security Warehousing Co., such amounts with interest as it may be decreed have been received by each of them respectively in excess of the amount to which they are entitled as the proceeds of the sales of said goods and the collection of the accounts receivable upon which they respectively had liens, and also such amounts with interest as it may be decreed are due your orator by reason of the improvident sale of said goods, and that your orator have such further and other relief as the nature of the circumstances of this case may require, and to your honors shall seem meet.

Your orator further prays that your honors may grant unto your orator a writ of subpœna of the United States of America, issued out of and under the seal of this honorable court, directed to the defendants, Charles S. Wenman, Stuyvesant Fish, George C. Boldt, Security Warehousing Company and United States Mortgage and Trust Company, commanding the said Wenman, Fish, Boldt, Security Warehousing Company and United States Mortgage and Trust Company at a certain time and under a certain penalty therein
to be named, personally to be and appear before this honor-
15 able court, then and there to answer all and singular (but
not under oath, answer under oath being hereby expressly waived) the matters aforesaid, and to stand and abide by and sus-

tain such direction and decree as shall be made herein, as to your honors shall seem equitable and just.

EDWARD B. WHITNEY,
Complainant.

ROBERT D. MURRAY,
Solicitor for Complainant; Office and Post Office Address, 30 Broad Street, New York City, New York.

R. D. MURRAY,
J. ASPINWALL HODGE,
GEORGE H. GILMAN,
Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

On this second day of November, 1904, before me personally appeared Edward B. Whitney, the above named plaintiff, who made solemn oath that he had read the foregoing bill of complaint, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

WM. C. FOSTER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Endorsed: Bill of complaint. Filed Nov. 7th, 1904. All of the demurrers sustained. Memorandum filed. Feb'y 7, 1905. G. C. H.

16 District Court of the United States, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Plaintiff,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. Boldt, Security Warehousing Co., and United States Mortgage & Trust Co., Defendants.
} In Equity. No. —.

To Thomas Alexander, Esq., clerk of district court of the United States, southern district of New York:

You will please enter my appearance in the above entitled suit for the defendants Charles H. Wenman, Stuyvesant Fish and George C. Boldt.

Dated December 6th, 1904.

Yours, &c.,
LOUIS F. DOYLE,
Solicitor for Defendants Wenman, Fish, and Boldt, 41 Park Row, Borough of Manhattan, City of New York.

Endorsed: Præcipe for appearance on behalf of C. H. Wenman, S. Fish and G. C. Boldt. Filed Dec. 6th 1904.

17 District Court of the United States. Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage & Trust Company.

To the clerk of the United States district court for the southern district of New York:

SIR: Please enter our appearance as solicitors for defendant, The Security Warehousing Company, in the above entitled suit.

Yours, &c., SMITH & BARKER,
Solicitors, 56 Pine Street, New York.

Endorsed: Appearance of defendant Security Warehouse Co. Filed Dec. 5, 1904.

18 The District Court of the United States in and for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage and Trust Company.

Please take notice that the respondent, United States Mortgage and Trust Company appears in this action by us as its solicitors.
Dated November 29, 1904.

ROLLINS — ROLLINS,
32 Nassau St., New York, N. Y.

To Thomas Alexander, Esq., clerk of the United States district court for the southern district of New York, and Robert D. Murray, Esq., solicitor for complainant, 30 Broad street, New York city.

Endorsed: Notice of appearance. Filed Dec. 2, 1904.

19 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants.
} In Equity. No. —.

Demurrer to Bill for Want of Jurisdiction.

The defendant Charles H. Wenman by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer showeth:

That it appears upon the face of the said bill of complaint that this court has not jurisdiction to take or have cognizance thereof or of the matters or things in the said bill of complaint alleged or of this cause.

Wherefore the said defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill of complaint or to the matters and things therein contained, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

LOUIS F. DOYLE,
Solicitor and of Counsel for Defendant Charles H. Wenman,
41 Park Row, Borough of Manhattan, City of New York.

20 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

LOUIS F. DOYLE,
Of Counsel for Defendant Charles H. Wenman.

STATE OF NEW YORK, County of New York, } ss:

Charles H. Wenman being duly sworn deposes and says: I am one of the defendants to the above entitled suit. The foregoing demurrer is not interposed for delay.

CHARLES H. WENMAN.

Subscribed and sworn to before me this 29th day of December, 1904.

[SEAL.]

THOMAS KEANEY,
Notary Public, New York County.

Endorsed: Demurrer for want of jurisdiction. Filed Jan'y 3, 1905.

21 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants.
} In Equity. No. —.

Demurrer to Bill for Want of Jurisdiction.

The defendant Stuyvesant Fish by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer showeth:

That it appears upon the face of the said bill of complaint that this court has not jurisdiction to take or have cognizance thereof or of the matters or things in the said bill of complaint alleged or of this cause.

Wherefore the said defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill of complaint or to the matters and things therein contained, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

LOUIS F. DOYLE,
Solicitor and of Counsel for Defendant Stuyvesant Fish,
41 Park Row, Borough of Manhattan, City of New York.

22 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

LOUIS F. DOYLE,
Of Counsel for Defendant Stuyvesant Fish.

STATE OF NEW YORK,
County of New York, } ss.:

Stuyvesant Fish being duly sworn deposes and says: I am one of the defendants to the above entitled suit.

The foregoing demurrer is not interposed for delay.

STUYVESANT FISH.

Subscribed and sworn to before me this 29th day of December, 1904.

[SEAL.] THOMAS KEANEY,
Notary Public, New York County.

Endorsed: Demurrer for want of jurisdiction. Filed Jan'y 3, 1905.

23 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants.
} In Equity. No. —.

Demurrer to Bill for Want of Jurisdiction.

The defendant George C. Boldt by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer showeth:

That it appears upon the face of the said bill of complaint that this court has not jurisdiction to take or have cognizance thereof or of the matters or things in the said bill of complaint alleged or of this cause.

Wherefore the said defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill of complaint or to the matters and things therein contained, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

LOUIS F. DOYLE,
Solicitor and of Counsel for Defendant George C. Boldt,
41 Park Row, Borough of Manhattan, City of New York.

24 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

LOUIS F. DOYLE,
Of Counsel for Defendant George C. Boldt.

STATE OF NEW YORK, County of New York, } *ss.*:

George C. Boldt being duly sworn deposes and says: I am one of the defendants to the above entitled suit. The foregoing demurrer is not interposed for delay.

GEO. C. BOLDT.

Subscribed and sworn to before me this 29th day of December, 1904.

[SEAL.] H. C. TUXBURY,
Notary Public, N. Y. Co.

Endorsed: Demurrer for want of jurisdiction. Filed Jan'y 3, 1905.

25 District Court of the United States for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company.
} In Equity.

Demurrer to Bill for Want of Jurisdiction.

This defendant, The Security Warehousing Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer showeth :—

That this court hath not jurisdiction to take and have cognizance of said bill and of the matters and things as therein alleged and of this cause.

Wherefore this defendant, The Security Warehousing Company, demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or of the matters and things therein contained, and prays to be hence dismissed with its costs in this behalf sustained.

SMITH & BARKER,
Solicitors for the Defendant The Security Warehousing Company, 56 Pine Street, New York City.

26 We hereby certify that the foregoing demurrer is, in *my* opinion, well founded in point of law.

EDWIN B. SMITH,
S. B. CLARKE,
Of Counsel for the Defendant,
The Security Warehousing Company.

New York, December 28th, 1904.

STATE OF NEW YORK,
City and County of New York,
Southern District of New York, } ss.:

George B. Wing, being duly sworn deposes and says that he is the secretary of The Security Warehousing Company, one of the above named defendants, and that the foregoing demurrer is not interposed for delay.

GEORGE B. WING.

Sworn to before me this 28th day of December 1904.

[Seal of Gertrude W. Martling, Notary Public, New York County.]

GERTRUDE W. MARTLING,
Notary Public (171), N. Y. County.

Endorsed: Demurrer. Filed Dec. 29, 1904.

27 United States District Court, Southern District of New York.
In Equity.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage & Trust Company.

Robert D. Murray, Aspinwall Hodge and George H. Gilman, for complainant.

Louis F. Doyle, for defendants Wenman, Fish & Boldt.

Edwin B. Smith and Samuel B. Clarke, for defendant Security Warehousing Company.

HOLT, J.:

This court has no general equity jurisdiction. The only provisions of the bankrupt act directly authorizing a trustee in bankruptcy to sue in this court, except by the consent of the defendant, are secs. 60*b*, 67*e* and 70*e*. All those sections relate to suits to recover property transferred by the bankrupt before adjudication. This suit is brought to recover property transferred by the receivers after adjudication. The only ground, therefore, in my opinion, upon which any plausible claim can be made that this court has jurisdiction in this case is that the property sought to be recovered was at one time *in custodia legis*. The rule is well settled that every court has an exclusive right to determine the distribution of a fund in its custody (*Re* Antigo Screen Door Co., 123 Fed. Rep., 249). But, in substance,

the complaint alleges and the demurrer admits that the Security Warehousing Company, before the bankruptcy, had taken a lease of the bankrupt's premises, had appointed a custodian of the
28 property, who was upon the premises, and had affixed to the goods tags asserting ownership; that when the receivers were appointed, it claimed that the store, sales and display room belonged to it, under the alleged lease, and that the goods therein contained had been stored with it by Dresser & Co.; that it had issued warehouse receipts upon the goods, which had been taken by the other defendants, apparently in good faith; that it demanded from the receivers the custody and delivery of all the goods; that the receivers did not dispute this claim, but acquiesced therein, and complied therewith; that agreements were entered into between the Security Warehousing Company and the receivers, under which some of the goods were sold by the receivers as the agents of the company, and some by the company through other agents. Under these circumstances I do not think it sufficiently appears on the face of the complaint that these goods were ever strictly *in custodia legis*. The receivers found some one else at the bankrupts' store claiming adversely, and apparently acquiesced in the claim. In order to authorize a court to entertain jurisdiction to recover from outside parties, by legal proceedings, property, the possession of which has been voluntarily relinquished by officers of the court, in acquiescense in an adverse claim, it must clearly appear that the property was previously absolutely in the custody of the court; and taking all the allegations of the complaint together, I do not think that that fact satisfactorily appears on the face of the complaint. The circumstances connected with the execution of the lease, the appointment of the custodian, the tagging of the goods, and the method in which the business was thereafter conducted as alleged in the complaint, undoubtedly make a strong
29 case for attacking the validity of the transaction, but what was done was intended to put, and is claimed by the defendants to have put, the legal title to the property in the Security Warehousing Company, and, in my opinion, did, in fact, put an apparent or colorable title in that company, which could not be simply disregarded and brushed aside as a sham in the bankruptcy proceedings. If the receivers had not acquiesced in the claim of the security company, a suit in equity or at least a proceeding in bankruptcy would have been necessary to reach the property claimed by the security company, and therefore I think that the receivers, when they took the bankrupts' property into their custody, took it subject to the claims of the security company, and that this court has never had the property in its custody free from such claims.

My conclusion is that the demurrer should be sustained.

February 7, 1905.

30 United States District Court, Southern District of New York.
In Equity.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the firm of Dresser & Co., Plaintiff,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, Security Warehousing Company, and United States Mortgage and Trust Company, Defendants.

The defendants Charles H. Wenman, Stuyvesant Fish and George C. Boldt, appearing by Louis F. Doyle, Esq., their solicitor, and the defendant The Security Warehousing Co. appearing by Messrs. Smith & Barker, its solicitors, having separately demurred to the bill of complaint herein on the ground that this court has not jurisdiction to entertain this suit, and the said demurrers having been argued by counsel and this court having been fully advised in the premises and being of the opinion that the said demurrers should be sustained, now it is

Ordered, adjudged and decreed that the demurrers of the said defendants above named and each of them, be and the same hereby are sustained and the bill of complaint herein dismissed on the ground that this court has not jurisdiction to entertain this suit, and it is further

Ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed with costs to the several
31 defendants appearing by separate solicitors, to wit, to the defendants Charles H. Wenman, Stuyvesant Fish and George C. Boldt, appearing by Louis F. Doyle, Esq., and to the Security Warehousing Co. appearing by Messrs. Smith & Barker.

GEO. C. HOLT, J.

Endorsed: Decree sustaining demurrer and dismissing bill Filed Feb'y 21, 1905.

32 United States District Court, Southern District of New York.
In Equity.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage and Trust Company, Defendants.

In this cause I hereby certify that the final decree dismissing the bill herein, and sustaining the demurrer thereto, dated the 20th day of February, 1905, is based solely on the ground that upon the facts

disclosed by the said bill the bankruptcy act (act of July 1st, 1898, chapter 541, as amended by act of February 5th, 1903, chapter 487) gives this court no jurisdiction over the parties to this controversy without the consent of the defendants, which has not been given, and that no other ground of jurisdiction under the statutes and Constitution of the United States appears upon the record of this cause.

This certificate is made in conformity to the act of Congress of March 3rd, 1891, chapter 517, and the opinion filed herein is made a part of the record, and will be certified and sent up as a part of the proceedings, together with this certificate.

At the request of the complain-t, an appeal to the Supreme Court of the United States is hereby allowed under the said act of Congress (chapter 517, act March 3rd, 1891).

February 28, 1905.

GEO. C. HOLT,
Judge of the District Court of the United States,
Southern District of New York.

Endorsed: Certificate. Filed March 2, 1905.

33 District Court of the United States for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage and Trust Company, Defendants.
} Petition for Appeal.

The above named complainant, conceiving himself aggrieved by the order and decree made and entered in this cause on the 20th day of February, 1905, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, may be sent to the Supreme Court of the United States.

February 28th, 1905.

ROBERT D. MURRAY,
Solicitor for Complainant,
No. 30 Broad Street, New York City, New York.

The foregoing appeal is hereby allowed.
Dated, Feb'y 28, 1905.

GEO. C. HOLT,
Judge of the District Court of the United States
for the Southern District of New York.

Endorsed: Petition for appeal. Filed March 2 1905

34 District Court of the United States for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Co., and United States Mortgage and Trust Co., Defendants.
} Assignment of Errors.

The complainant prays an appeal from the final decree of this court, dated the 20th day of February, 1905, to the Supreme Court of the United States, and assigns for error:

First. That the district court of the United States for the southern district of New York erred in sustaining the demurrers to the bill herein and dismissing the bill on the ground that the said district court did not have jurisdiction to entertain this suit.

Second. That the district court of the United States for the southern district of New York erred in dismissing the bill herein with costs to the several defendants appearing by separate solicitors.

Third. That the district court of the United States for the southern district of New York erred in not dismissing the demurrers herein and sustaining the bill on the ground that the said district court had jurisdiction of this suit.

35 Fourth. That the district court of the United States for the southern district of New York erred in not sustaining the bill herein with costs to the complainant.

February 28th, 1905.

ROBERT D. MURRAY,
Complainant's Solicitor,
No. 30 Broad Street, Borough of Manhattan,
City of New York, New York.

Endorsed: Assignment of errors. Filed March 2, 1905.

36 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles H. Wenman, Stuyvesant Fish, George C. Boldt, the Security Warehousing Company, and United States Mortgage and Trust Company, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at Washington, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the district court of the United States for

the southern district of New York, wherein Edward B. Whitney as trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Riess as members of the firm of Dresser & Co. is appellant and you are appellees, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States this first day of March, 1905.

GEO. C. HOLT,
Judge of the District Court of the United States
for the Southern District of New York,
in the Second Circuit.

37 Service of the within citation and receipt of a copy thereof is hereby admitted this 2nd day of March, 1905.

LOUIS F. DOYLE,
Solicitor for Wenman, Fish, and Boldt, Appellees.
SMITH & BARKER,
Solicitors for Appellee The Security Warehousing Co.
ROLLINS & ROLLINS,
Solicitors for Appellee United States Mortgage
& Trust Company.

Endorsed: Citation. Filed M'ch 9/05.

38 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant-Appellant,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage and Trust Company, Defendants-Appellees.

I, Thomas Alexander, clerk of the district court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing appeal and the allowance thereof and in obedience thereto, do hereby certify that the foregoing pages numbered from two (2) to thirty-eight (38) inclusive, contain a true and complete transcript of the record and proceedings had in said district court in the above-entitled cause as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 16th day of March, in the year of our Lord one

thousand nine hundred and five and of the Independence of the United States the one hundred*th* and twenty-ninth.

[Seal District Court of the United States, Southern District of N. Y.]

THOS. ALEXANDER, Clerk.

39 [Endorsed :] U. S. district court, southern district of New York. Edward B. Whitney, as trustee, etc., complainant-appellant, against Charles H. Wenman *et al.*, defendants-appellees. Certified record on appeal.

Endorsed on cover: File No. 19,676. S. New York D. C. U. S. Term No. 576. Edward B. Whitney, as trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co., appellant, *vs.* Charles H. Wenman, Stuyvesant Fish, George C. Boldt, *et al.* Filed March 22d, 1905. File No. 19,676.